UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONNA J. FORSYTH, et al.,

Plaintiffs,

v.

HP INC., et al.,

Defendants.

Case No. 5:16-cv-04775-EJD

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 371

This class action arises out of Defendants HP Inc. ("HPI") and Hewlett Packard Enterprise Company ("HPE") alleged violations of the Age Discrimination in Employment Act of 1967 ("ADEA"), the California Fair Employment and Housing Act ("FEHA"), and other California state laws.

Lead Plaintiffs Donna J. Forsyth, Dan Weiland, Shafiq Rahman, Albert R. Devere, Arun Vatturi, and Kevin Alviso worked for and were hired by Hewlett-Packard Co. ("HP Co."). After HPE and HPI were formed, lead Plaintiffs worked for and were terminated by either HPI, HPE, or HP Co. Plaintifffs argue they were terminated in violation of state and federal employment laws. Defendants contend that this Court must dismiss Plaintiffs' Third Amended Complaint for failure to state a claim upon which relief can be granted and/or for lack of standing. Having considered the Parties' papers, the Court **GRANTS in part and DENIES in part** Defendants' motion to dismiss.[1]

[1] Pursuant to N.D. Cal. Civ. L.R. 7-1(b), this Court found this motion suitable for consideration

I. BACKGROUND

A. Factual Background

1. HP Co., HPI, and HPE's Employment Practices

In 2012, under the direction of Meg Whitman, HP Co. allegedly began implementing a company-wide initiative to replace thousands of existing, older workers with new, younger employees. Third Amended Complaint ("TAC") ¶ 2, Dkt. 360. This initiative was referred to as the "Workforce Restructuring Initiative." *Id.* Whitman was (and remains) the President and Chief Executive Officer ("CEO") of HP Co. *Id.* When rolling out this initiative, Whitman said the goal was to restructure HP CO.'s workforce over a period of approximately five years, *i.e.* 2012 through 2017. *Id.* In Plaintiffs' view, through this statement, Whitman made it known that she regarded the age of HP's workforce as a problem that needed solving. *Id.* ¶ 12. Indeed, Whitman publicly stated several times that HP had a problem with its "labor pyramid," and that she intended to "restructure" it by replacing older workers with younger hires. *Id.* ¶¶ 30–34; *see also id.* ¶ 3 ("In October 2013, Ms. Whitman admitted publicly during a Securities Analyst Meeting that the Initiative's overarching goal was to 'recalibrate and reshape' the workforce by 'replacing' existing workers with 'a whole host of young people.'"). In order to execute the Workforce Restructuring Initiative, Whitman caused HP to implement a two-pronged strategy that involved (1) pushing current, older workers out of the company, while (2) hiring large numbers of new, younger employees to replace them. *Id.* ¶ 10.

In November 2015, HP Co. split into two companies, HPI and HPE. *Id.* ¶ 4. Since the split, Whitman served as the Chair of the Board of Directors for HPI until July 26, 2017 and as the CEO for HPE until February 1, 2018 and also served on the board of HPE until February 1, 2019. *Id.* During her tenure at HPI and HPE, both companies allegedly continued to implement the age initiative in concert with one another. *Id.* ¶ 5. Plaintiffs allege that the companies shed thousands of employees starting in November 2015 and planned to continue to terminate thousands of other

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without oral argument. *See* Dkt. 380.

employees through 2017. *Id.* Hence, according to Plaintiffs, all three HP Entities shared the common goal of wanting to make the entire HP organization younger. *Id.* ¶ 6. All three entities shed thousands of older workers, while aggressively recruiting and hiring younger employees to replace them. *Id.*

To execute the first prong of the Workforce Restructuring Initiative, HP initiated the "2012 Workforce Reduction Plan" ("WFR"), which was adopted by both HPE and HPI and was implemented over a period of years. *Id.* ¶ 10. However, contrary to the name, the WFR was not meant to reduce the HP workforce, but was a means to restructure, recalibrate, and reshape the HP workforce to make it younger. *Id.* ¶¶ 11, 30–34. This, Plaintiffs contend, is confirmed by Whitman's public statements, in which Whitman made clear that she intended to make HP "younger." *Id.* ¶ 11. During a 2013 Securities Analyst Meeting, for instance, Whitman confirmed that HP was "working very hard to recalibrate and reshape [its] labor pyramid" so it would have a "whole host of young people" at its base. *Id.* ¶ 31. Whitman also admitted that HP was "amping up [its] early career hiring, [and] [its] college hiring." *Id.* Meanwhile, according to Plaintiffs, HP was terminating thousands of existing employees pursuant to the WFR. *Id.* When replacing employees that were terminated under the WFR, Whitman acknowledged that HP had an "informal rule" requiring managers to "really think" about hiring a younger "early career" employee. *Id.* Indeed, internal HP Co. documents dated July 2015 stated that anyone born between 1930 and 1946 could be considered a "Traditionalist" who moves "slow and steady" and seeks "part time work." *Id.* ¶ 60. "Baby Boomers" (born between 1946 and 1964) were considered to be "rule breakers," which implies that they are "undesirable." *Id.* "Millennials," on the other hand were highly desirable and HP Co. specifically adopted strategies for "integrat[ing] millennials into the workforce" and "educat[ing] managers and others on millennial characteristics." *Id.* Plaintiffs allege these policies were carried forth at HPE and HPI. *See infra*.

The Workforce Restructuring Initiative continued for years. In September 2015, when the WFR had been ongoing for three years, Whitman stated that HP still needed to "fundamentally

recreate the labor pyramid" because the pyramid looked too much like "a diamond" and it needed to look "like a quite flat triangle to be competitive." *Id.* ¶ 32. In November 2015, just as Whitman was preparing to take on senior leadership roles at HPI and HPE, Whitman confirmed in an interview that the goal for HPE was to higher younger employees to replace laid-off employees. *Id.* ¶ 33 ("[T]o make sure that we've got a labor pyramid with *lots of young people* coming in right out of college and graduate school and early in their careers. That is an important part of the future of the company . . . ." (emphasis added)).

Moreover, as noted, HPI and HPE both used the same WFR process and paperwork that HP used. *See id.* ¶¶ 10, 24–25, 36. The two companies also worked together to coordinate efforts to implement the WFR, which Plaintiffs allege resulted in continued discriminatory employment practices. *Id.* ¶¶ 25, 35–39, 44–48, 56–57, 64–66, 155. Plaintiffs further contend that the HP entities worked together to impose a common ban on rehiring any employees discharged pursuant to the WFR, regardless of what entity the employee was fired from. *See id.* ¶¶ 25, 44–46 (describing the coordinated "blacklisting policy"). HPI and HPE also implemented similar early retirement policies that were meant to pressure older employees to leave "voluntarily" or risk being involuntarily fired under the WFR. *Id.* ¶¶ 38–42. Plaintiffs allege that the coordinated efforts between HPI and HPE were at Whitman's direction as part of her ongoing initiative to make *all* the HP entities "younger." *Id.* ¶¶ 4, 7, 25. Both HPI and HPE followed the two-step workforce restructuring initiative outlined above. *See id.* ¶¶ 35–37. According to Plaintiffs, HPI and HPE even used the same terminology as HP to review employees—existing employees slated for termination under the WFR were called "slates," and the new hires that management hired to replace them were called "reqs." *Id.* ¶ 35.

Plaintiffs maintain that the slate and req process followed a "distinct pattern." At both HPI and HPE (and at HP before the split), upper-level managers directed subordinate managers to slate certain numbers of older long-term or long-tailed ("LT") employees for termination under the WFR. *Id.* Simultaneously, the upper-level managers authorized subordinate managers to hire a

similar number of early career employees to replace them. *Id.* During this process, HP's human resources department distributed written guidelines in August 2013 that described a "requisition policy." *Id.* ¶ 50. This policy mandated that at least 75% of people hired to replace terminated LT employees be early career hires. *Id.* ¶¶ 50-52. Managers who resisted directives to slate and replace LT employees were allegedly in danger of being terminated. For instance, Plaintiff DeVere was instructed to identify two employees from his team to slate for termination under the WFR. *Id.* ¶ 67. Plaintiff DeVere identified two employees for termination; he selected two younger early career hires who he believed were performing poorly. *Id.* Plaintiff DeVere's supervisor told him he should be slating LT employees rather than younger employees. *Id.* Plaintiff DeVere resisted the direction to slate LT employees and ultimately designated the two younger employees for termination. *Id.* This decision, however, was overruled by human resources and two older members of Plaintiff DeVere's team (over the age of 40) were fired under the WFR. *Id.* ¶ 68. Soon thereafter, Plaintiff DeVere, who was also over the age of 40, was fired under the WFR. *Id.* Plaintiffs argue that this, in combination with Whitman's other statements, show that older employees were terminated because of their age. *Id.* ¶¶ 35, 67–68.

Defendants also projected their discriminatory employment practices through their public advertisements. Plaintiffs maintain that HP entities' employment ads frequently contained unlawful discriminatory statements like:

- This position is for a recent college graduate. To qualify, you must have graduated with your Bachelor's or Master's degree within the last 12 months.
- In order to be considered for this role, you must have graduated within 12 months of the start date.
- Must have graduated within 12 months of July 2016.
- This position is for a recent college graduate. To qualify you must have received your last degree within the past 12 months.
- The candidate must be a recent graduate

- We are looking for recent college graduates and early career candidates.
- The successful candidate must be near degree completion (Dec 2015 or prior) or have graduated within the past 12 months.
- Must be a recent college graduate (2015) or graduating by January 2016.
- Must have completed degree within the past 12 months.
- We are seeking candidates who have recently graduated. Only applicants who have graduated within the past year (July 2014 – August 2015) will be considered for this role, and this will be verified during the background check.
- Recent college graduates preferred.

Id. ¶ 56. These statements, Whitman's public statements, and internal guidance allegedly created an atmosphere of hostility toward older workers, which, Plaintiffs allege, had a direct impact on managers' decisions about which employees to slate for termination under the WFR. *Id.* ¶¶ 35, 50, 53–54, 60, 63, 69. Plaintiffs argue that these facts show an intentional disparate treatment of older employees. In the alternative, to show disparate impact Plaintiffs provide a statistical analysis using the data available before filing this case which shows that older workers (age 40 and older) were substantially more likely to be terminated under the WFR than younger employees. *Id.* ¶¶ 69–79.

2. Plaintiffs and the Class

There are currently six named Plaintiffs and 30 opt-in Plaintiffs in this case, all of whom were terminated under the WFR. The six named Plaintiffs are:

1. **Donna Forsyth.** Plaintiff Forsyth was hired by HP Co. on or about July 12, 1999. *Id.* ¶ 75. Before she was terminated, Plaintiff Forsyth was working for HPE in Bellevue, Washington. *Id.* Plaintiffs allege that she always "met or exceeded her employer's expectations" and that she performed her duties in a satisfactory and competent manner. *Id.* ¶ 76. In May 2016, HPE notified Plaintiff Forsyth, who was 62 years old at the time, that she was being terminated pursuant to a WFR Plan. *Id.* ¶ 78. Plaintiffs allege that

Forsyth was replaced with a "graduate" or "early career," *i.e.*, someone who is significantly under the age of 40. *Id.* ¶ 79. Plaintiff Forsyth received a Notice of Right to Sue from the EEOC dated August 2, 2016. *Id.* ¶ 80. She has thus exhausted her administrative remedies.

2. **Arun Vatturi.** Plaintiff Vatturi was hired by HP Co. in 2001. *Id.* ¶ 81. Before he was terminated, Plaintiff Vatturi worked for HPI in Palo Alto, California. *Id.* Plaintiff Vatturi worked on internal systems to improve procedure and save money for HP Co. *Id.* ¶ 83. Plaintiffs allege that Vatturi was a competent and invaluable employee—he was one of the 0.5% of employees at HP Co. to receive the company's top performance review rating. *Id.* ¶¶ 82–83. In January 2016, HPI notified Plaintiff Vatturi, who was 52 years old at the time, that he was being terminated pursuant to a WFR Plan. *Id.* ¶ 85. Plaintiffs allege that Vatturi was replaced with a "graduate" or "early career," *i.e.*, someone who is significantly under the age of 40. *Id.* ¶ 86. Plaintiff Vatturi received a Notice of Right to Sue from the EEOC dated August 2, 2016 and a notice of right to sue from the California Department of Fair Employment and Housing on July 6, 2016. *Id.* ¶ 87. He has thus exhausted his administrative remedies.

3. **Dan Weiland.** Plaintiff Weiland was hired by HP Co. as an independent contractor in 2010; in February 2012, he was hired by HP Co. as a full-time employee. *Id.* ¶ 88. Before he was terminated, Plaintiff worked as a Project/Program Manager and Acting Chief of Staff in the Test Operations & Technologies organization in Houston, Texas. *Id.* Plaintiffs allege that Weiland was a competent and invaluable employee—before he as laid off, he was praised as a "solid contributor" who brought a "positive, 'can do' attitude" and a strong work ethic with him every day. *Id.* ¶¶ 89, 90. In 2014, Plaintiff Weiland received the "Making a Difference" award. *Id.* ¶ 90. In September 2014, HP Co. notified Plaintiff Weiland that he was eligible to participate in the 2014 Phased Retirement program. *Id.* ¶ 91. His manager had several conversations with Plaintiff Weiland to try to persuade him

to participate in the retirement program. *Id.* Ultimately, Plaintiff Weiland declined to participate in the program. *Id.* In July 2015, HP Co. notified Plaintiff Weiland, who was 63 years old at the time, that he was being terminated pursuant to a WFR Plan. *Id.* ¶ 92. Plaintiffs allege that Weiland was replaced with a "graduate" or "early career," *i.e.*, someone who is significantly under the age of 40. *Id.* ¶ 93. Plaintiff Weiland received a Notice of Right to Sue from the EEOC dated October 5, 2015. *Id.* ¶ 94. He has thus exhausted his administrative remedies.

4. **Shafiq Rahman.** Plaintiff Rahman began working at Compaq in April 1997, which was acquired by HP Co. in 2002. *Id.* ¶ 95. Before he was terminated, Plaintiff Rahman was a Senior Engineer and developed computer servers for HPE. *Id.* Plaintiffs allege that Rahman was a competent employee—before he was terminated, he was told his performance was "good" and that he should consider himself "safe" from termination. *Id.* ¶ 96. However, on July 18, 2016, when Plaintiff Rahman was 65 years old, he was terminated pursuant to the WFR plan. *Id.* ¶ 97. Plaintiffs allege that Rahman was replaced with a "graduate" or "early career," *i.e.*, someone who is significantly under the age of 40. *Id.* ¶ 98. Plaintiff Rahman received a Notice of Right to Sue from the EEOC dated September 29, 2016. *Id.* ¶ 98. He has thus exhausted his administrative remedies.

5. **Albert R. DeVere.** Plaintiff DeVere began working for HP Co. in September 2010. *Id.* ¶ 100. Before he was terminated in 2016, Plaintiff DeVere was a Manager of Solution Architects for HPE. *Id.* Plaintiffs allege that DeVere was a competent employee who always met or exceeded his employer's expectations. *Id.* ¶ 101. Indeed, Plaintiff DeVere never received any negative performance reviews during his time at HP Co. and HPE. *Id.* In July 2016, Plaintiff DeVere, who was 52 years old, was terminated under the WFR plan. *Id.* ¶ 102. Plaintiffs allege that DeVere was replaced with a "graduate" or "early career," *i.e.*, someone who is significantly under the age of 40. *Id.* ¶ 103. Plaintiff DeVere filed a charge of discrimination with the EEOC on October 5, 2016. *Id.* ¶ 104. He has thus

exhausted his administrative remedies.

6. **Kevin Alviso.** Plaintiff Alviso began working for HP Co. in June 1997. *Id.* ¶ 105. Before he was terminated, Plaintiff Alviso worked as a Research and Development Manager for HPE. *Id.* Plaintiffs allege that Alviso was a competent employee who always met or exceeded his employer's expectations. *Id.* ¶ 106. Indeed, Plaintiff Alviso never received any negative performance reviews during his time at HP Co. and HPE—in fact, Plaintiff Alviso received top ratings in each of his last five annual reviews. *Id.* ¶ 106. In October 2016, Plaintiff Alviso, who was 53 years old, was terminated under the WFR plan. *Id.* ¶ 107. Plaintiffs allege that Alviso was replaced with a "graduate" or "early career," *i.e.*, someone who is significantly under the age of 40. *Id.* ¶ 108. Plaintiff Alviso filed a charge of discrimination with the EEOC on January 18, 2017 and received a Notice of Right to sue on March 30, 2018. *Id.* ¶ 109. He has thus exhausted his administrative remedies.

The Complaint alleges two different classes: (1) a Nationwide Class and (2) a California Class. Each class is asserted against Defendants, *i.e.* HP Entities HPI and HPE. Plaintiffs seek to represent the Nationwide Class. The Nationwide Class asserts an ADEA claim and includes all individuals aged 40 and older who have not signed a Waiver and General Release Agreement, and who had their employment terminated by an HP Entity pursuant to a WFR Plan on or after December 9, 2014 for individuals terminated in deferral states and on or after April 8, 2015 for individuals terminated in non-deferral states. *Id.* ¶¶ 110, 111 135–46. Plaintiffs Vatturi and Alviso also seeks to represent the California class. The California Class asserts (1) an FEHA age discrimination claim, (2) an age discrimination in violation of public policy claim, and (3) an unfair competition claim. *See id.* ¶¶ 147–67.

B. Procedural History

On August 18, 2016, Plaintiffs filed their Complaint. *See* Dkt. 1. Subsequently, on November 14, 2016, Defendants moved to partially dismiss the original Complaint and to compel arbitration of a former Plaintiff's claim. *See* Dkt. 42, 44. On November 15, 2016, Defendants

moved to strike the proposed nationwide ADEA collective definition and the Rule 23 California class definition. Dkt. 46. Plaintiffs then filed their First Amended Complaint, which mooted Defendants initial motions. Dkt. 60. However, on January 30, 2017, Defendants move to partially dismiss the First Amended Complaint and to compel arbitration for some former Plaintiffs. Dkt. 74, 75. On March 20, 2017, Defendants also moved to compel arbitration of the claims of 13 opt-in Plaintiffs. Dkt. 99–108.

On September 20, 2017, this Court granted Defendants' motion to compel arbitration as to 15 named and opt-in Plaintiffs, denied without prejudice Defendants' motion to partially dismiss the First Amended Complaint, and stayed the action pending resolution of the arbitrations. Dkt. 132. On February 6, 2018, the Court continued the stay, but allowed Plaintiffs to amend the First Amended Complaint to add additional plaintiffs. Dkt. 152. Plaintiffs then filed their Second Amended Complaint, which added Alviso as the new named Plaintiff for the California class. Dkt. 168. On November 6, 2018, the Court dismissed with prejudice the claims of former Plaintiffs Staton, Kaplan, Becks, and the other 13 opt-in Plaintiffs who were involved in arbitration proceedings. Dkt. 177. Between November 16, 2018 and May 2, 2019, an additional 156 individuals joined the action. Dkt. 179–82, 185, 190–334, 337, 342. Ultimately, 145 of the opt-in plaintiffs were found to have signed a Waiver and General Release Agreement and these plaintiffs were dismissed after the parties mediated their claims. Dkt. 336, 361, 367–68.

On January 7, 2020, Plaintiffs filed the TAC, which expressly excludes the claims of individuals who have executed a Waiver and General Release Agreement. *See* TAC. None of the remaining named or opt-in Plaintiffs have executed a Waiver and General Release Agreement. On February 6, 2020, Defendants filed a motion to dismiss Plaintiffs' TAC. Defendants' Notice of Motion and Motion to Dismiss Third Amended Complaint ("Mot."), Dkt. 371. Defendants also filed a request for judicial notice in support of their motion to dismiss. Defendants' Request for Judicial Notice in Support of Motion to Dismiss ("RJN"), Dkt. 372. On March 9, 2020, Plaintiffs filed an opposition to the motion to dismiss. Plaintiffs' Memorandum of Points and Authorities in

Opposition to Defendants' Motion to Dismiss ("Opp."), Dkt. 376. Plaintiffs also filed a response to Defendants' request for judicial notice. Plaintiffs' Response to Defendants' Request for Judicial Notice ("RJN Opp."), Dkt. 377. On March 30, 2020, Defendants filed a reply. Defendants' Reply in Support of Motion to Dismiss Plaintiffs' Third Amended Complaint ("Reply"), Dkt. 378. Defendants also filed a second request for judicial notice in support of their reply. Defendants' Request for Judicial Notice in Support of Reply ("RJN 2"), Dkt. 379.

II. LEGAL STANDARD

A. Rule 12(b)(1)

To contest a plaintiff's showing of subject matter jurisdiction, a defendant may file a Rule 12(b)(1) motion. Fed. R. Civ. P. 12(b)(1). A defendant may either challenge jurisdiction "facially" by arguing the complaint "on its face" lacks jurisdiction or "factually" by presenting extrinsic evidence (affidavits, etc.) demonstrating the lack of jurisdiction on the facts of the case. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

"In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. During a facial attack, the court examines the complaint as a whole to determine if the plaintiff has "alleged a proper basis of jurisdiction." *Watson v. Chessman*, 362 F. Supp. 2d 1190, 1194 (S.D. Cal. 2005). When evaluating a facial attack, the court assumes the complaint's allegations truth and draws all reasonable inferences in the plaintiff's favor. *Wolfe*, 392 F.3d at 362. The court may not consider evidence outside the pleadings when deciding a facial attack. *See, e.g.*, *MVP Asset Mgmt. (USA) LLC v. Vestbirk*, 2011 WL 1457424, at *1 (E.D. Cal. Apr. 14, 2011).

In contrast, in resolving a factual attack, the district court may review evidence beyond the complaint without converting the motion to dismiss into one for summary judgment. *Safe Air*, 373 F.3d at 1039. No presumptive truthfulness attaches to the plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating the merits of

jurisdictional claims. *Gregory Vill. Partners, L.P. v. Chevron, U.S.A., Inc.*, 805 F. Supp. 2d 888, 895 (N.D. Cal. 2011). Further, once the defendant presents extrinsic evidence, the plaintiff, must establish jurisdiction with evidence from other sources. *Id.*; *see also Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

B. Rule 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (discussing Federal Rule of Civil Procedure 8(a)(2)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The requirement that the court "accept as true" all allegations in the complaint is "inapplicable to legal conclusions." *Id.* It is improper for the court to assume "the [plaintiff] can prove facts that it has not alleged" or that the defendant has violated laws "in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

If there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible, the "plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Dismissal can be based on "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Hence, when a claim or portion of a claim is precluded as a matter of law, that claim may be dismissed pursuant to Rule 12(b). *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 975 (9th Cir. 2010) (discussing Rule 12(f) and noting that 12(b)(6), unlike Rule 12(f), provides defendants a mechanism to challenge the legal sufficiency of complaints). However, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *No. 84 Employer-Teamster Joint Council v. Am. W. Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003).

III. JUDICIAL NOTICE

Defendants request for the Court to take judicial notice of several exhibits. Federal Rule of Evidence 201(b) permits a court to take judicial notice of an adjudicative fact "not subject to reasonable dispute," that is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Specifically, a court may take judicial notice of matters of public record. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

Defendants first request for the Court to take judicial notice of Exhibits 1–3. *See* RJN at 2. Exhibits 1 and 2 are excerpts of HPI and HPE's Form 10-Ks for the fiscal year ending October 31, 2015. *See* Declaration of Richard W. Black ("Black Decl.") ¶¶ 2–3, Dkt. 372-1. Exhibit 3 is the Department of Fair Employment & Housing's ("DFEH") response to a public records request that states that DFEH found no records regarding Plaintiff Kevin Alviso. *Id.* ¶ 4. In response, Plaintiffs argue that while the Court may take judicial notice of public documents, the Court may not notice the factual content of the exhibits therein. This is true. "[A] court may take 'judicial notice of matters of public record,' but 'cannot take judicial notice of disputed facts contained in such public records.'" *Baird v. BlackRock Institutional Tr. Co., N.A.*, 403 F. Supp. 3d 765, 774 (N.D. Cal. 2019) (quoting *Khoja*, 899 F.3d at 999). Where the SEC filings are "subject to varying interpretations, and there is a reasonable dispute as to what the [SEC filings] establish[]," the court should refuse to take judicial notice of the truth of any factual assertions or statements contained therein. *Baird*, 403 F. Supp. 3d at 775 (quoting *Khoja*, 899 F.3d at 1000). Hence, with respect to Exhibits 1 and 2, while the Court takes judicial notice of the documents, it does not take judicial notice of any disputed facts therein. *But see infra* IV.B. (finding the facts therein not subject to reasonable dispute).

Plaintiffs next argue that the Court may not take notice of Exhibit 3. The Court agrees—Plaintiffs have provided Plaintiff Alviso's notice of right to sue letter from DFEH, which shows that DFEH made an error when it responded to Defendants' public records request. See RJN Opp.

at 2. Accordingly, Defendants request for judicial notice is **GRANTED** as to Exhibit 1 and 2, but **DENIED** as to Exhibit 3.

Defendants next request for the Court to take judicial notice of Exhibits 1 and 2 attached to the Second Black Declaration. *See* RJN 2 at 2. Exhibit 1 is the charge that Plaintiff Kevin Alviso filed with the EEOC. *Id.* at 2. Exhibit 2 is a copy of Exhibit 2.4 of HP Inc.'s 2015 Form 8-K, which was filed with the SEC on November 5, 2015. Because both exhibits sought to be noticed are matter of public record and are not subject to reasonable dispute, Defendants' request for judicial notice is **GRANTED**.

IV. DISCUSSION

Defendants first argue that Plaintiffs have failed to state an ADEA/FEHA[2] because they have failed to plead plausible facts that support either (1) disparate treatment or (2) disparate impact. Mot. at 8, 11.[3] Defendants further argue that certain claims against Defendants HPE and HPI must be dismissed for lack of standing and/or failure to state a claim. *Id.* at 18, 24. Defendants last argue that Plaintiffs are not entitled to injunctive relief. *Id.* at 24. The Court addresses each argument in turn.

A. ADEA/FEHA Claims

The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). The statute provides that it is

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[2] California courts look to federal precedent when interpreting the FEHA because of its similarity to the ADEA. *See Guz v. Bechtel*, 8 P.3d 1089 (Cal. 2000). If Plaintiffs fail to plead a ADEA claim, they will also fail to plead an FEHA claim. In fact, California law applies a lesser standard of causation. *See Harris v. City of Santa Monica*, 294 P.3d 49, 55 (Cal. 2013) ("Our precedent has recognized, however, that 'but for' causation is not the only possible meaning of the phrase 'because of' in the context of an antidiscrimination statute."). Hence, because the Court holds below that Plaintiffs have plead a ADEA claim, Plaintiffs by default have plead a claim under the "easier" FEHA standard.

[3] The Parties agree that the allegedly wrongful policy is facially neutral. "Where, as here, a plaintiff is challenging a facially neutral policy, there must be a specific allegation of discriminatory intent." *Wood v. City of San Diego*, 678 F.3d 1075, 1081 (9th Cir. 2012).

not unlawful for an employer to base employment decisions on "reasonable factors other than age," or to discharge an individual for "good cause." *Id.* § 623(f)(1). The United States Supreme Court has recognized two theories of employment discrimination in the context of the ADEA: disparate treatment and disparate impact. *See Heineke v. Santa Clara Univ.*, 2017 WL 6026248, at *18 (N.D. Cal. Dec. 5, 2017) (collecting cases). In a disparate treatment claim, the employer "treats some people less favorably than others because of their race, color, religion [or other protected characteristics]." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (alteration in original) (citation omitted). Disparate impact claims, by contrast, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* (citation omitted).[4]

In a disparate treatment case, liability depends on whether the protected trait—age—actually motivated the employer's decision. *Hazen*, 507 U.S. at 610. Hence, to establish a violation of the ADEA under the disparate treatment theory of liability, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (collecting cases). The plaintiff thus must establish causation; the plaintiff must show that age was the "but-for" cause of the employer's adverse action. *Id.* at 177. To demonstrate but-for causation, ADEA plaintiffs may rely on either direct or circumstantial evidence. *Id.* 177–78.

Defendants argue that Plaintiffs have not pled sufficient facts to show that they were terminated because of their age. Mot. at 8. Defendants contend that Plaintiffs have failed to plausibly allege the critical element of causation. *Id.* at 9. Plaintiffs maintain that the TAC alleges both direct and circumstantial evidence of disparate treatment.

"Direct evidence, in the context of an ADEA claim, is defined as evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly

[4] Because the Court holds that Plaintiffs have plead a disparate treatment claim, the Court does not reach the disparate impact arguments. *See* Opp. at 16, 19.

reflecting the alleged discriminatory attitude," which are "sufficient to permit the fact finder to infer that the attitude was more likely than not a motivating factor in the employer's decision." *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 812 (9th Cir. 2004) (quotation marks and citation omitted). Plaintiffs argue that the TAC alleges ample direct evidence to allow the Court to infer that the WFR plan was created and implemented to discriminate against older workers. *See* Opp. at 10–11 (citing TAC ¶¶ 2, 6–9, 13, 14, 25, 31–35, 37, 47–56, 57, 69–74). Plaintiffs further argue that the TAC adequately alleges that each Plaintiff was terminated because of the discriminatory WFR plan. *See* TAC ¶¶ 76, 82, 89, 96, 106, 139. The Court agrees—the TAC alleges sufficient direct evidence to support a plausible ADEA claim based on a disparate treatment theory.

As recounted above, starting in 2012, Whitman implemented a five-year workforce restructuring initiative in 2012. *See supra*; *see also* TAC ¶¶ 30–35. Whitman was vocal about her desire to recruit and hire young people; Whitman wanted a "whole host of young people." *See* TAC ¶¶ 30–35. Curiously, Defendants contend that these statements do not evince a discriminatory intent toward older-workers since they simply related to HP Co.'s "high-level goal to prepare for the eventual retirement of portions of the workforce." Reply at 4. Yet, this is exactly contrary to Whitman's stated goal of reshaping and recalibrating the HP workforce to *immediately* include more young people. *See* TAC ¶ 32 ("We have to fundamentally recreate the labor pyramid."); *see also id.* ¶ 33 (discussing job cuts at HP and how they relate to HP's goal of filing its labor pyramid with "lots of young people"). Defendants argue that even if these statements show a preference toward younger employees, they do not show that Plaintiffs were terminated because of their age. *See* Mot. at 10; *see also* Reply at 4–5. But, there is no "smoking gun" requirement—all that Plaintiffs must plead are facts that plausibly show that it is more likely than not that they were discriminated against because of their age. *See Enlow*, 389 F.3d at 812. Whitman's statements tend to show that the HP entities did not want to (1) hire older employees or (2) retain older employees. *See Enoh v. Hewlett Packard Enterprise Co.*, 2018 WL 3377547, at

*11 (N.D. Cal. July 11, 2018)[5] (finding Whitman's comments about her desire for a younger workforce to be "startling").

Moreover, Whitman's statements were not "contained" to just HP Co. To the contrary, according to Plaintiffs' TAC, these statements directly translated into discriminatory hiring and firing practices at both HPI and HPE. *See supra* I.A. (noting that HPI and HPE used the same WFR process and worked together to implement the WFR). Indeed, the TAC shows that both HPI and HPE used the Workforce Restructuring Initiative to terminate older employees and hire younger ones. The Initiative and the related WFR were announced as means to reduce the HP workforce. TAC ¶ 11. Yet, the Initiative did not result in a decreased HP workforce. Rather, "in the nearly five years since [HP Entities] began to implement the Initiative and the WFR plans . . . the HP Entities have added thousands of new [and younger] employees to replace those who were terminated under the WFR Plans." *Id.* In Plaintiffs' view, Whitman's ageist statements explain why the Initiative did not result in a reduction of HP employees—the Initiative and WFR were always meant to be used to replace older employees with younger employees. This is supported by the factual allegations. As Plaintiffs allege, HP job postings stated that HP was only hiring younger employees. TAC ¶¶ 56. HP Co. even acknowledged that they should remove references to experience levels so as to avoid discrimination related litigation. *Id.* ¶ 58. More damning, when older employees were laid off, managers were "strongly encouraged" to hire recent college graduates. *Id.* ¶ 31. This is to say, Plaintiffs have provided sufficient facts to support their theory that HPI and HPE were terminating older employees under cover of the WFR plan.

However, a general background of discrimination is insufficient. In order to support their disparate impact theory, Plaintiffs must show *their* age was the "but-for" cause for their

[5] Defendants argue that this case undermines Plaintiffs' disparate treatment theory. Reply at 5. To the contrary, unlike in *Enoh* which addressed a disparate impact claim, Plaintiffs are alleging a disparate treatment claim *and* Plaintiffs have plead sufficient facts which link Whitman's "startling comments" to Plaintiffs' terminations. *Cf. Enoh*, 2018 WL 3377547, at *11.

termination. *See Gross*, 557 U.S. at 176. In other words, Plaintiffs must connect the allegedly discriminatory animus to their eventual terminations. To show this by direct evidence, Plaintiffs must show that all the evidence (or plead facts) show that discrimination was "more likely than not a motivating factor in the employer's decision." *Enlow*, 389 F.3d at 812. Plaintiffs have met this burden. They have plead plausible facts which show that Plaintiffs were competently performing their jobs. *See supra* I.A. The TAC alleges that most of the named Plaintiffs were excelling at their jobs. *Id.* Moreover, Plaintiffs have alleged facts that show that managers were *required* to terminate older employees because such employees were "old." *See* TAC ¶¶ 66–68; *see also* 29 U.S.C. § 623(a)(1) (requiring the allegedly discriminatory action to be "because of" the plaintiff's age). They also have alleged facts that plausibly show that older employees were terminated based on antiquated stereotypes. *See* TAC ¶ 60 (stating that Defendants considered older employees to move "slow and steady" and "undesirable"); *see also Hazen Paper Co.*, 507 U.S. at 610 ("Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."). These pleadings, coupled with the general age-animus demonstrated by Whitman, support Plaintiffs' theory that Plaintiffs' age (*i.e.*, their protected trait) was the *cause of* their termination. *See Hazen Paper Co.*, 507 U.S. at 610.

Contrary to Defendants' motion, *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014) does not change this analysis. There, the Ninth Circuit reviewed the *Twombly*/*Iqbal* pleading standard and discussed the meaning of "plausible." *Eclectic Props.*, 751 F.3d at 996. Specifically, the court noted that:

> When faced with two *possible* explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also inconsistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible.

Id. at 996–97 (quoting *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (emphasis added). Here, Plaintiffs' TAC offers facts that tend to exclude Defendants' innocuous alternative explanation (*i.e.*, that HP entities were merely planning for older employees' eventual retirement). *See supra* (discussing Plaintiffs' allegations that they were fired without cause and that managers were instructed to terminate older employees). Hence, *Eclectic Properties* does not change this Court's conclusion that Plaintiffs have plead direct evidence of disparate treatment.[6] Accordingly, Defendants' motion to dismiss Plaintiffs' ADEA/FEHA claims is **DENIED.**

B. Standing

It is well established that Article III standing must be satisfied prior to bringing any claim in federal court. *See Bruce v. United States*, 759 F.2d 755, 757 (9th Cir. 1985). Standing is a jurisdictional limitation; it is an "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To

[6] Plaintiffs also argue that they have plead facts which show circumstantial evidence of disparate treatment. Circumstantial evidence of age discrimination exists where a plaintiff is (1) at least forty years old at the time of discharge, (2) meets the requisite qualifications for the job, and (3) is discharged while younger employees were retained. *Enlow*, 389 F.3d at 812 (citing *Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 142 (2000)); *see also Brazill v. Cal. Northstate College of Pharmacy, LLC*, 904 F. Supp. 2d 1047, 1052–53 (E.D. Cal. 2012). If a plaintiff meets these factors, the burden shifts to the defendant to show that the plaintiff was terminated for a legitimate, non-discriminatory reason. *Enlow*, 389 F.3d at 812. Hence, by pleading a *McDonnell Douglas prima facie* case of employment discrimination, plaintiffs can survive the motion to dismiss phase. *See, e.g.*, *Brazill*, 904 F. Supp. 2d at 1053.

After the Supreme Court's decision in *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009 (2020), the Court is unsure whether or not simply pleading a *prima facie* case is sufficient. In *Comcast*, the Supreme Court held that to plead a 42 U.S.C. § 1981 discrimination claim, the "plaintiff must initially plead and ultimately prove that, *but for* race, it would not have suffered the loss of a legally protected right." 140 S. Ct. at 1019. The Supreme Court also noted that "*McDonnell Douglas* can provide no basis for allowing a complaint to survive a motion to dismiss when it fails to allege essential elements of a plaintiff's claim." *Id.* Section 1981 and Section 623(a)(1) both require but-for causation to be initially plead and ultimately proved. Causation is thus an essential element of the discrimination claim. Therefore, simply pleading *prima facie* case of employment discrimination, without showing but-for causation, is insufficient. The Court held above that Plaintiffs have plead direct evidence to support causation. Hence, the Court need not assess Plaintiffs' circumstantial evidence or resolve the effect of *Comcast* on this case.

establish Article III standing, a plaintiff must allege facts sufficient to show: (1) that she has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical; (2) that the injury is "fairly traceable" to the challenged action of the defendant; and (3) it is likely, as opposed to "merely speculative" that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). The burden to show standing is on the party who seeks the exercise of jurisdiction in his or her favor to "clearly . . . allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *United States v. Hays*, 515 U.S. 737, 743 (1995). And, when subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff bears the burden of proving jurisdiction in order to survive the motion. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Only "employees" have standing to sue under the ADEA. *See* 29 U.S.C. § 623(a); *see also Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1312 (9th Cir. 1998) ("A claimant under . . . the ADEA must establish himself as an 'employee.'"). Likewise, California law requires an employment relationship to confer standing under the FEHA. *See* Cal. Gov't Code § 12940; *see also Estrada v. City of L.A.*, 159 Cal. Rptr. 3d 843, 846 (Ct. App. 2013) ("In order to recover under the discrimination in employment provisions of the FEHA, the aggrieved plaintiff must be an employee." (quotation marks and citation omitted)); *Cavallaro v. UMass Mem'l Health Care, Inc.*, 971 F. Supp. 2d 139, 146 (D. Mass. 2013) (stating that where liability is predicated on an employment relationship, a plaintiff's alleged injuries "are only traceable to, and redressable by, [the entities] who are deemed by law to have employed [them]").

Plaintiffs allege that they worked for *either* HPE or HPI. Yet, Plaintiffs generally assert claims against "HP Entities." *See, e.g.*, TAC ¶ 112. Defendants argue that this is improper because some Plaintiffs were not employed by the company that they assert a discriminatory termination claim. Mot. at 3.[7] Hence, in Defendants' view, some Plaintiffs lack standing to

[7] Defendants initially argued in their motion to dismiss that Plaintiff Alviso failed to exhaust his

pursue discriminatory termination claims against HPE and/or HPI and so such Plaintiffs claims must be dismissed pursuant to Rule 12(b)(1). Plaintiffs argue that they have standing to pursue claims against *any* HP entity because of (1) the integrated enterprise doctrine, (2) aiding and abetting liability, or (3) assumption of liability. The Court addresses each theory in turn.

1. Integrated Enterprise Doctrine

Under the "single employer" or "integrated enterprise" doctrine, two or more business entities may be treated as a single employer or integrated-enterprise. The default presumption is that "separate corporate entities have distinct identities" and plaintiffs bear a "heavy burden under both California and federal law when they seek to rebut this presumption and hold multiple corporate entities liable as a single employer." *Rhodes v. Sutter Health*, 2012 WL 662462, at *5 (E.D. Cal. Feb. 28, 2012). Courts weigh four factors when analyzing whether entities constitute an integrated enterprise: (1) "interrelation of operations," (2) "common management," (3) "centralized control of labor relations," and (4) "common ownership or financial control." *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 815 (9th Cir. 2002).

a. Interrelation of Operations and Common Management

To make a sufficient claim for interrelation of operations, a plaintiff must plead facts showing that the alleged integrated enterprises have a greater interrelation than normal.[8] *Lackey v. Fed. Express Corp.*, 2018 WL 6174719, at *3 (C.D. Cal. June 11, 2018) (quotation marks and

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administrative remedies as required under FEHA. *See* Mot. at 3. Plaintiffs rebutted this by filing a copy of Defendant Alviso's right-to-sue letter from the DFEH. Opp. at 20. Defendants argue in response that the Court should ignore the letter because Plaintiffs failed to provide Defendants with this letter earlier. Of course, there is no requirement at this stage that such a letter be presented to Defendants. In the alternative, Defendants argue that the Court should ignore the letter because it was presented for the first time in opposition papers. But, the contrary is true—Defendants raised this issue in their motion papers, Plaintiffs are entitled to rebut Defendants' allegations with documents subject to judicial notice. The Court thus declines to examine Defendants' exhaustion argument any further.

[8] Typically, the integrated enterprise doctrine is applied to parent-subsidiary relationships. Defendants argue that on this ground alone, the integrated enterprise doctrine is not available to Plaintiffs. *See* Reply at 11. Yet, Defendants provide no precedent to support this argument. The Court does not see why the integrated enterprise doctrine would be unavailable outside the parent-subsidiary context.

citation omitted). "Shared management is shown when the parent corporation shares directors with the subsidiary and controls the selection of board members for the subsidiary." *Id.* at *4.

The TAC has no specific allegations regarding interrelation of operations or common management. *See generally* TAC. The TAC only alleges that Whitman orchestrated the split of HP Co. into HPI and HPE and that she continued to "exert control and substantial influence over the implementation of the Initiative at the post-split entities, HPI and HPE." *Id.* ¶ 7; *see also id.* ¶ 25 (alleging that both entities had virtually identical discriminatory policies and practices). Plaintiffs argue that HPI and HPE's use of the same WFR processes, terminology, and paperwork as HP Co. shows interrelation. *See id.* ¶ 36. However, such bare allegations about Defendants' shared management and WFR processes are insufficient to show interrelation of operations. *Lackey*, 2018 WL 6174719, at *3; *see also Rhodes*, 2012 WL 662462, at *6 ("Some overlap between the management of corporations, though, is not necessarily inappropriate."). That both HPI and HPE used the same WFR processes and paperwork is irrelevant—the question is whether the companies were so interrelated that they operated as one. Plaintiffs do not allege this. To the contrary, they argue that the companies were interrelated because they *seperately* used the same WFR processes.

There is only one common manger alleged: Meg Whitman. Yet, there is no allegation that Whitman did not respect HPE and HPI's separate corporate identities or that HPI controlled HPE's board of directors (or vice versa). *See Rhodes*, *Rhodes*, 2012 WL 662462, at *6. Accordingly, Plaintiffs have failed to show common ownership and management.

b. Centralized Control of Labor Relations

"Although courts consider the four factors together, they often deem centralized control of labor relations the most important [factor]." *Lackey*, 2018 WL 6174719, at *3 (quotation marks and citation omitted). The critical question is, "what entity made the final decisions regarding employment matters related to the person claiming discrimination?" *Id.* (quoting *Rhodes*, 2012 WL 662462, at *5).

The TAC fails satisfy the control prong because it fails to specify how HPE managers and supervisors took part in day-to-day employment decisions about HPI employees (and vice versa). *See Rhodes*, 2012 WL 662462, at *6 (noting that complaint failed to allege facts suggesting any centralized control of employment matters in the parent or that the parent played any role in the employment actions at issue). Indeed, here, there is no allegation that HPI directed HPE's hiring and/or firing decisions. The TAC is devoid of any allegations that connect the alleged misconduct to each of the named Defendants. *See Piccirillo v. Testequity, Inc.*, 2015 WL 4778823, at *4 (C.D. Cal. Apr. 13, 2015). Allegations that simply lump HPI and HPE together by calling them "the HP Entities" fail to state a valid claim because they do not articulate the manner in which HPI/HPE took part in the employment actions at issue. For these reasons, Plaintiffs have failed to plead facts that show centralized control.

c. Common Ownership or Financial Control

Lastly, while the TAC alleges that HPE and HPI are "HP Entities," judicially-noticed facts show that HPI and HPE are separate corporations. *See* RJN, Ex. 1 & 2. Moreover, "common ownership or control alone is never enough to establish parent liability." *Lackey*, 2018 WL 6174719, at *4. Accordingly, because the FAC does not include allegations sufficient to satisfy any of the above factors, the FAC fails to plausibly allege that Defendants are an integrated enterprise.

2. Aiding and Abetting Liability

Under the FEHA, those who aid or abet another in any discriminatory practice are jointly and severally liable. Cal. Gov't Code § 12940(i) (making it an unlawful employment practice for "any person to aid, abet, incite, compel or coerce the doing of any acts forbidden" by the FEHA). To plead aiding and abetting liability under the FEHA, Plaintiffs must specifically allege that each Defendant knew the other's conduct amounted to discrimination and gave substantial assistance to that discrimination. *See Hall v. Hamilton Family Ctr.*, 2014 WL 1410555, at *4 (N.D. Cal. Apr. 11, 2014) (noting that FEHA does not define "aiding or abetting" and that courts have adopted the

common law definition).

The TAC does not plead facts that show Defendants knew the other's conduct amounted to discrimination. For instance, Plaintiffs argue that after Plaintiff Rahman was terminated by HPI pursuant to the WFR plan, HPE refused to hire him because he was laid off under a WFR Plan. *See* TAC ¶ 46. Lacking in this allegation, however, is *any* indication that HPE (1) knew that Plaintiff Rahman was terminated pursuant to a WFR plan *or* (2) knew that HPI's conduct was discriminatory. *But see Hall*, 2014 WL 1410555, at *5 (analyzing when aiding and abetting liability attaches); *Alch v. Superior Court*, 19 Cal. Rptr. 3d 29 (Ct. App. 2004). While Plaintiffs plead that Plaintiff Rahman applied to the HPE job via the 60 Day Preferential Rehire Period, it is unclear whether or not applicants were specifically labeled as preferential rehires, such that HPE would know that Rahman as terminated pursuant to a WFR plan. This Court thus cannot conclude that Defendants knew about each other's discriminatory conduct.

3. Assumption of Liability

Plaintiffs last argue that both HPI and HPE are responsible for age discrimination that occurred before HP split into HPI and HPE. In Plaintiffs' view, the "Separation and Distribution Agreement," which separated the "Enterprise Business" from HP Co. and created HPE, shows that HPE assumed liability for HP Co.'s discrimination that occurred prior to the split. Opp. at 21. Plaintiffs further maintain that the Agreement holds both HPI and HPE responsible for age discrimination that occurred before HP split into HPI and HPE. *Id.*

The "Employee Matters Agreement," which was attached to the "Separation and Distribution Agreement," states that neither HPE or HPI assumed liability associated with the termination of employees who did not primarily perform work for that entity. *See* RJN 2, Ex. 2 at § 2.2(a) (stating that HPI will pay and compensate only HPI employees); *id.* § 2.2(b) (same); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by

exhibit."). The Court thus finds that Defendants did not assume HP Co.'s liabilities.[9]

To clarify, Plaintiffs who worked for and were terminated by HPE cannot allege claims against HPI and Plaintiffs who worked for and were terminated by HPI cannot allege claims against HPE. Likewise, Plaintiffs who worked for HP Co. cannot assert claims against HPI or HPE. Moreover, such Plaintiffs cannot represent a class asserting such claims. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) (holding that a putative class action plaintiff cannot manufacture an injury by relying on the purported injuries "suffered by other, unidentified members of [a] class").[10] Accordingly, Defendants motion to dismiss claims asserted against HPI by non-HPI employees and claims asserted against HPE by non-HPE employees is **GRANTED**.

C. UCL Claim

The UCL "establishes three varieties of unfair competition [claims]—acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Plaintiff Vatturi and Alviso assert a UCL claim based on the alleged discriminatory practices outlined above and argue that these practices are "unlawful, unfair, and/or fraudulent." *See* TAC ¶ 166. Defendants concede that as plead, the alleged discriminatory practices amount to an unlawful and/or unfair business practice. *See* Mot. at 23 (arguing only that Plaintiff Alviso's claim must be dismissed because he failed to exhaust his administrative remedies); *but see supra* n.7 (noting that Plaintiff Alviso did exhaust his administrative remedies).

However, Defendants argue that Plaintiffs have not plead enough facts to support their fraudulent UCL claim. Mot. at 24. Rule 9(b)'s particularity requirement applies to UCL claims bought in federal court where a fraudulent business practice is alleged. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Under Rule 9(b), averments of fraud must be accompanied by "the who, what, when, where, and how" of the misconduct charged. *Vess v.*

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[9] The Court notes that the TAC is unclear as to which employee worked for which HP entity; without such clarity, the Court cannot determine the scope of the relevant classes. The Court instructs Plaintiffs to clarify this when they amend their complaint.

[10] This reasoning applies equally to Plaintiffs' derivative UCL claims. *See Stevenson v. Superior Court*,16 Cal. 4th 880, 904–06 (1997).

Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003). The TAC does not allege the "who, what, when, where, and how" of the misconduct charged. Rather, it only mentions "fraud" in passing without specifying the conduct that amounted to fraud. *See* TAC ¶¶ 163, 166. These bare-bones allegations amount to legal conclusions and are thus insufficient to establish a UCL claim under the "fraud prong." For this reason, Defendants' motion to dismiss the fraudulent UCL claim is **GRANTED.**

D. Injunctive Relief

Defendants last argue that Plaintiffs are not entitled to injunctive relief. *See* TAC at 30 (requesting an injunction that orders Defendants to stop discriminating against older workers based on age). Defendants argue that Plaintiffs have not plead facts sufficient to show that Defendants' allegedly discriminatory conduct is ongoing or likely to recur such that injunctive relief would remedy present and ongoing discrimination.

Former employees typically lack standing to bring claims for injunctive relief against their former employers—such employees typically cannot meet the "redressability" requirement of Article III. *See Walsh*, 471 F.3d at 1037; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364–65 (2011) (finding that a plaintiff who cannot reasonably be expected to benefit from prospective relief lacks standing for an injunction). Courts have carved out a limited exception: a non-employee or former employee may have standing to sue an employer for injunctive relief if such individuals are in the process of seeking reinstatement to their former positions or if they are seeking work from that employer. *See id.* (collecting cases). Indeed, past exposure to illegal conduct "does not itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Neal v. City of Seattle*, 66 F.3d 1064, 1066 (9th Cir. 1995) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *see also Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864 (9th Cir. 2017) (noting that claims for injunctive relief become moot once it is clear the conduct alleged as the basis for the requested relief "could not reasonably be expected to recur").

The last named Plaintiff, Plaintiff Alviso, was terminated in October 2016. *See* TAC ¶¶ 16–21. There are no allegations that the discriminatory conduct either (1) continued after October 2016 *or* (2) that the discriminatory conduct continued to personally affect Plaintiffs. Indeed, none of the Plaintiffs' specific allegations involve conduct that occurred after 2017. *See id.* ¶ 2 (alleging that Defendants planned to restructure the workforce from 2012 through 2017). Likewise, no Plaintiff alleges that they are seeking reemployment from Defendants. Plaintiffs thus have not shown that they are "reasonably likely" to benefit from prospective relief and so, Plaintiffs lack standing to pursue injunctive relief. *See Pels v. Keurig Dr. Pepper, Inc.*, 2019 WL 5813422, at *5 (N.D. Cal. Nov. 7, 2019) (dismissing request for injunctive relief at the pleadings stage where claim of injury was "precisely the type of hypothetical injury that is fatal to a claim for injunctive relief"); *cf.* Opp. at 22 (arguing that at the pleading stage, courts should not strike remedies). Accordingly, Defendants motion to dismiss Plaintiffs' request for injunctive relief is **GRANTED**.

V. LEAVE TO AMEND

When dismissing a complaint for failure to state a claim, a court should grant leave to amend "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Defendants argue that this Court should not grant Plaintiffs leave to amend since this is Plaintiffs' third amended complaint. The Court will, however, allow Plaintiffs one more opportunity to amend their complaint since it is possible Plaintiffs can cure their allegations by alleging, among other things, more particular facts to support an (1) aiding and abetting theory of liability and (2) injunctive relief. Accordingly, the Court finds amendment would not be futile and **GRANTS** Plaintiff leave to amend.

VI. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is **GRANTED in part and DENIED in part**. Plaintiff may file an amended complaint curing the deficiencies discussed herein by **July 9, 2020.** Plaintiff may not add new claims or parties without leave of the Court or stipulation by the Parties pursuant to Federal Rule of Civil Procedure 15.

IT IS SO ORDERED.

Dated: May 18, 2020

EDWARD J. DAVILA
United States District Judge